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IN THE

Supreme Court of the United States

October Term, 1967

No. 618

FORTNIGHTLY CORPORATION,

Petitioner,

v.

UNITED ARTISTS TELEVISION, INC.,

Respondent.

On Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

MOTION FOR LEAVE TO FILE AND BRIEF FOR THE ALL-CHANNEL TELEVISION SOCIETY AS AMICUS CURIAE

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The All-Channel Television Society (ACTS) moves for leave to file a brief as *amicus curiae* in this case. The consent of the attorney for the respondent has been granted. The attorney for petitioner has stated he will not oppose this motion.

ACTS is a national association representing the interests of present and potential television broadcast stations which do or will operate on ultra high frequency (UHF) channels and which do and will continue to depend for their economic survival upon revenues derived from the broadcast of copyrighted programs.[1] In order to obtain a maximum audience – and revenues – from the broadcast of these programs, the stations traditionally bargain for and obtain exclusive broadcast licenses in the areas the stations serve.

As ACTS will show in its brief, without licenses from the copyright holders, CATV systems operating in the service areas of UHF stations pick up and retransmit to their subscribers copyrighted programs broadcast by distant television stations serving other areas for which the UHF stations have also obtained broadcast rights. Such unauthorized CATV retransmission unfairly undermines and dissipates the broadcast rights for which the local UHF stations have bargained, since their main feature – exclusivity in the area served by the UHF stations – is destroyed.

To uphold the decision of the Court below, the Court must find that CATV retransmission of a program broadcast by a television station is a public performance of the program. Respondents, in their opposition to the Petition for Writ of Certiorari, and the United States, in its Memorandum, have conclusively established this proposition and ACTS will not burden the Court with an additional argument on the matter. However, ACTS can contribute to the Court's consideration of this case by focusing on the serious threat to the establishment and

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[1] ACTS was formed in April, 1967, but did not begin to function effectively until June, 1967. For this reason ACTS did not seek to submit an *amicus* brief in the Court below.

healthy maintenance of free, local UHF television service, and hence to the national communications system established pursuant to Congressional mandate,[2] that would be presented by the exemption from the provisions of the copyright act of CATV retransmission of programs broadcast by distant television stations.

For these reasons ACTS believes that its *amicus* brief will aid the Court in the disposition of this case and respectfully requests that leave to submit its brief be granted.

Respectfully submitted,

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[2] See Section 307 (a) of the Communications Act of 1934, as amended, 47 U.S.C. 307(b).

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ARGUMENT

One of the basic questions squarely presented in this case is whether CATV systems are liable under the copyright laws for the unlicensed retransmission of programs broadcast by television stations far removed from the community in which

the CATV system operates and clearly not intended for "off-the-air" reception by the systems' subscribers.

Whatever the role performed by CATV systems which merely improve reception of television programs intended to be received by the systems' subscribers, there is little question but that CATV systems, including the systems in this case, are today also actively engaged in and planning for the retransmission of distant television stations on a massive basis. Indeed, the records of the Federal Communications Commission reveal that some 230 petitions are pending for authorization to retransmit the programs of distant television stations. Moreover, in many instances, the CATV systems operate or plan to operate in areas where there are no unusual reception problems and where, as a matter of fact, a number of television stations provide free, off-the-air service not only to the specific geographic areas served by the CATV systems but to areas the CATV systems do not propose to serve for economic reasons or otherwise. Thus, CATV systems are planned for such major cities as Philadelphia, which has six commercial television stations in operation and one planned for the future,[1] Cleveland which has four television stations in operation, one under construction and applications pending for still another,[2] and Buffalo which has three television stations in operation and three planned for the future.[3]

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[1] See, *In the Matter of WIBF Broadcasting Co. and Philadelphia Television Broadcasting Co. v. Lower Bucks Cablevision, Inc., and Philadelphia Community Antenna Television Company*, FCC Docket No. , filed, January 10, 1968.

[2] See, *Telerama, Inc.*, 7 Pike & Fischer RR 2d 275 (1967).

[3] See, *Untravision Broadcasting Co.*, 11 Pike & Fischer RR 2d 1222 (1968).

CATV retransmission of distant stations is made possible through the use of sophisticated and expensive receiving antenna devices not available to the general public or through the use of microwave facilities which convert the television signals picked up to different frequencies and relay them to the CATV system's receiving station where they are reconverted for reception on normal television sets. See, *First CATV Report and Order*, 30 Fed. Reg. 6038 n. 1(b) (1965). CATV systems are capable of and now retransmit or propose to retransmit the programs of television stations operating hundreds – and in some cases more than a thousand – miles from the area in which the CATV system operates. See, *e.g.*, *Corsicana Television Cable Company, Inc.*, FCC File No. CATV 100-106. Moreover, CATV systems also originate their own programs. To cite but one instance, there are applications now pending before the Commission proposing a microwave network throughout the State of Texas for the sole purpose of providing to CATV systems programs not broadcast by television stations. See, *Applications of Dal-Worth Microwave, Inc.*, FCC File Nos. 7661/7662-C1-P-66. CATV systems also sell advertising, as shown by the "rate card" of the Reno, Nevada CATV systems appended hereto.

CATV systems, then, are nothing less than commercial "closed circuit" television stations, and there is no basis whatever for exempting them from the copyright laws. Indeed, such an exemption would not only undermine the statutory copyright scheme, but, as we shall demonstrate, would undermine the statutory communications scheme as well.

Pursuant to the Congressional mandate to achieve a "fair, efficient, and equitable distribution of radio services" throughout the United States (Communications Act of 1934, as amended, Section 307(b), 47 U.S.C. 307(b)), the Federal Communications Commission, in 1952, concluded that "as many

communities as possible should have the opportunity of enjoying the advantages that derive from having local outlets that will be responsive to local needs" (*Sixth Television Report and Order,* 17 Fed. Reg. 3905, 3912-13 (1952)). The Commission recognized that the utilization of UHF as well as VHF channels would be necessary to achieve that end, since there are not enough VHF channels available to provide the desired multiplicity of television services throughout the country. However, until 1962 the Commission's goal was almost completely frustrated as a result of the scarcity of television receivers equipped to receive UHF channels. Since most television receivers were capable of receiving only VHF channels, few UHF stations were constructed and even fewer achieved a reasonable degree of economic viability. But the passage of the All-Channel Receiver Law in 1962 (76 Stat. 150, 47 U.S.C. Sections 303(a), 330) removed the artificial barrier to realization of the Commission's television allocation goal created by the manufacture and sale of "VHF only" television receivers. And consistent with Congressional and Commission expectations the pace of UHF development since the passage of the law has accelerated dramatically and an even more dramatic acceleration is insured for the future.

Thus, according to the records of the Federal Communications Commission, as of December 31, 1964, some six months after the All-Channel Receiver Law went into effect, there were only 88 commercial UHF stations on the air, while there are now 139 commercial UHF stations in operation, an increase of more than 50 percent.

Neither the development of additional UHF television services nor the prospect of the imposition of copyright liability has deterred the growth and expansion of CATV systems, as evidenced by the almost two thousand CATV systems now in operation and the plans for CATV systems in the nation's

largest cities which will serve hundreds of thousands of homes at development costs running into the tens of millions of dollars. See, *e.g., Ultravision Broadcasting Co.*, 11 Pike & Fischer RR 2d 1222; *Telerama, Inc.*, 7 Pike & Fischer RR 2d 275; *Midwest Television, Inc., v. Southwestern Cable Co.*, 6 Pike & Fischer RR 2d 785.

A substantial number of UHF stations which commenced operations after the passage of the All-Channel Receiver Law, and most UHF stations under construction and planned for the future, are and will be "independent," that is, not affiliated with one of the three national television networks. As such, they must rely heavily upon popular syndicated and feature film programs to attract the audiences and revenues necessary to sustain their operations, including their non-revenue producing public service programming. Without exception, every syndicated and feature film program broadcast by these stations is done so pursuant to a license granted by the holder of the copyright for that program which the UHF station has purchased at substantial cost. Thus, during 1967, WPHL-TV, an independent UHF station serving Philadelphia, Pennsylvania spent more than $800,000.00 for the rights to broadcast feature films and syndicated programs. See, *In the Matter of WIBF Broadcasting Co. and Philadelphia Television Broadcasting Co. v. Lower Bucks Cablevision, Inc. and Philadelphia Community Antenna Television Company*, FCC Docket No. , filed January 10, 1966.

Of primary importance to independent UHF stations purchasing licenses for syndicated and feature film programs is the right to exclusive showing of the programs in the stations' service areas for a reasonable period of time. Without exclusivity, the stations might not be able to attract the audiences necessary to derive sufficient advertising revenues to offset the costs of programs as well as the station's non-revenue producing programming.

However, CATV retransmission of syndicated and feature film programs broadcast by distant television stations can destroy the right to program exclusivity bargained for and purchased at substantial cost by the local stations. For example, CATV systems are planned for a number of areas in and around the City of Philadelphia which would retransmit the programs of three New York City independent VHF stations. UHF Station WPHL-TV, during the week of October 28 to November 3, 1967, surveyed programs broadcast by those New York City stations, as well as stations in operation in Philadelphia, and the survey established that during that week, 79.7% of all syndicated programs broadcast by the Philadelphia stations pursuant to exclusive licenses from the holders of the copyright for the programs were also broadcast by the New York City Stations.[4] Retransmission of the programs of the New York City independent stations by the Philadelphia CATV systems would therefore, at the very least, undermine the exclusivity right for which the Philadelphia stations have bargained and could even result in the ultimate demise of the Philadelphia independent UHF stations once the CATV systems were established throughout the entire Philadelphia area.

A further specific example of CATV destruction of program value and exclusivity rights is the experience of UHF Station WBRE-TV, serving Wilkes-Barre-Scranton, Pennsylvania. At a cost of $21,000.00, the station purchased a group of feature films, among which was the film "The Magnificent Seven." WBRE-TV scheduled the broadcast of the film for November 5, 1967, but on October 23, 1967, thirteen days

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[4] See, Petition of Philadelphia Television Broadcasting Co., *In the Matter of Philadelphia Television Broadcasting Co. v. Lower Bucks Cablevision, Inc.*

before its broadcast on WBRE-TV, "The Magnificent Seven" was broadcast by WOR-TV, one of the three New York City independent stations, and via CATV that broadcast was made available to more than 75,000 homes – more than 25 percent of the total – in the WBRE-TV primary service area. Significantly, without CATV the prior showing of the film in the Wilkes-Barre area (and the violation of WBRE-TV's right to exclusivity) would not have been possible since New York City is more than 100 miles from Wilkes-Barre-Scranton and beyond the normal service area of WOR-TV.

In sum, present-day CATV systems including the CATV systems in this case, are deeply engaged in the retransmission for a profit of the programs of distant television stations whose signals the CATV systems intercept and extend to the communities in which the CATV systems operate. CATV systems thus directly compete with local television stations for audience – and even advertising revenues – and if local television stations must obtain licenses for the copyright programs they transmit, then the CATV systems should also be required to obtain licenses for the programs of the distant television stations the CATV systems retransmit.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully requests that the decision of the court below should be affirmed.

Respectfully submitted,

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APPENDIX

CATV
6
RENO/SPARKS

ADVERTISING INFORMATION

RATE CARD NO. 1—Effective Jan. 1, 1968

785 E. 2nd
RENO, NEVADA 89502

AT LAST . . . television advertising rates at reasonable prices.

PLACE . . . your TV message on Independent CATV 6.

TIMES AVAILABLE . . .

Weekdays: 12:00 Noon — 1:30 p.m.
5:00 p.m. — 7:00 p.m.
4:00 a.m. — 8:30 a.m.

Weekends: 8:30 a.m. Saturday to 8:30 a.m. Monday

Slides with background music appear for one minute on a rotation basis.

Program a. — One slide* would appear 58 times per week.
Cost — 15 ¢ per min. — $8.70 per week

Program b. — Two slides* would appear 116 times per week.
Cost — 12½ ¢ per min. — $14.50 per week

* Slide must be provided by advertiser or will be supplied by us at our cost.

WHAT IS CATV 6 . . .

An independent closed circuit television channel available exclusively to Community/Antenna subscribers.

Programming consists of movies, sports, features, and cartoons.

(Sponsorship of programs is also available. Program sponsorship allows for 60 sec. pre-cut audio/tape message with slide. . . Racket Squad is an example of the many fine programs available . . . RATES ON REQUEST.)

COMMUNITY ANTENNA has over 10,000 sets connected providing an estimated 30,000 potential viewers for your message. This makes CATV 6 one of the most reasonable advertising methods available.

For more information, or to make arrangements for your commercial, call

COMMUNITY ANTENNA — 323-0741

and ask for the advertising manager.